

LAW OFFICES OF STEVEN S. LUBLINER

P.O. Box 750639

Petaluma, CA 94975

Phone: (707) 789-0516

Fax: (707) 789-0515

E-mail: sslubliner@comcast.net

November 24, 2004

Jill L. Brown, Acting Warden
San Quentin Prison
San Quentin, CA 94964

Re: Donald J. Beardslee, C-82702

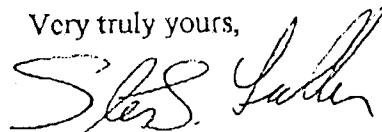
Dear Warden Brown,

I am representing death row inmate Donald J. Beardslee in challenges to California's method of execution. Mr. Beardslee will not be selecting a method of execution. Therefore, by law, he will be executed by lethal injection. Mr. Beardslee intends to bring suit in federal court under 42 U.S.C. § 1983 challenging California's lethal injection procedure as violating his rights under the Eighth and First Amendments to the United States Constitution.

Mr. Beardslee is required to exhaust his administrative remedies in order to bring suit in federal court. Enclosed are two original 602 forms signed by Mr. Beardslee in which he separately exhausts his claims under the Eighth and First Amendments. Mr. Beardslee will also be delivering originals to the Appeals Coordinator to be sent to you. Please note that this administrative appeal is being filed as an emergency appeal pursuant to 15 Cal. Code Regs. § 3084.7.

I do not envision that it will be necessary for you to speak with Mr. Beardslee to resolve his appeals. Should you wish to interview him about his claims, please contact me first so that I can arrange to be present.

Very truly yours,



Steven S. Lubliner

cnc.

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

**INMATE/PAROLEE
APPEAL FORM**
 CDC 602 (12/07)

Location: Institution/Parole Region

Log No.

Category

1.

SQ

1.

04-2953

10

2.

2.

You may appeal any policy, action or decision which has a significant adverse affect upon you. With the exception of Serious CDC 115s, classification committee actions, and classification and staff representative decisions, you must first informally seek relief through discussion with the appropriate staff member, who will sign your form and state what action was taken. If you are not then satisfied, you may send your appeal with all the supporting documents and not more than one additional page of comments to the Appeals Coordinator within 15 days of the action taken. No reprisals will be taken for using the appeals procedure responsibly.

NAME	NUMBER	ASSIGNMENT	UNIT/ROOM NUMBER
BEARDSLEE, Donald J.	C-82702	Condemned - Grade A	NS-18-S

A. Describe Problem: The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights. Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested: If the State is going to execute me, they must fix the procedure by which they do lethal injection to make certain I will not suffer unnecessary pain and suffering.

Inmate/Parolee Signature: Donald J. Beardslee Date Submitted: 11-24-04

C. INFORMAL LEVEL (Date Received: _____)

NOV 29 REC'D

Staff Response: _____

Bypass

Staff Signature: _____ Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an EMERGENCY APPEAL and have not sought review at the Informal Level. I am doing so because I may have an execution date as soon as early January. I do not have a stay of execution in place.

Signature: Donald J. Beardslee Date Submitted: 11-24-04

Note: Property/Funds appeals must be accompanied by a completed Board of Control form BC-1E, Inmate Claim

CDC Appeal Number:



First Level ☐ Granted ☐ P. Granted ☐ Denied ☐ Other

E. REVIEWER'S ACTION (Complete within 15 working days): Date assigned: _____ Due Date: _____

Interviewed by: _____

Bypass

Staff Signature: _____ Title: _____ Date Completed: _____

Division Head Approved: _____ Title: _____ Returned: _____

Signature: _____ Title: _____ Date in Inmate: _____

F. If dissatisfied, explain reasons for requesting a Second-Level Review, and submit to Institution or Parole Region Appeals Coordinator within 15 days of receipt of response.

Bypass

Signature: _____ Date Submitted: _____

Second Level ☐ Granted ☐ P. Granted ☒ Denied ☐ OtherG. REVIEWER'S ACTION (Complete within 10 working days): Date assigned: **NOV 29 2004** Due Date: **DEC 29 2004**☐ See Attached LetterSignature: *W. Leppan CCA* Date Completed: **12-06-04**Warden/Superintendent Signature: *[Signature]* Date Returned to Inmate: **DEC 09 2004**

H. If dissatisfied, add date or reasons for requesting a Director's Level Review, and submit by mail to the third level within 15 days of receipt of response.

Although my concerns about the lethal injection procedure have been written about extensively, the Second Level response does not address the issues raised by my Eighth Amendment and First Amendment claims. For additional support for my claims, please see the enclosed material.

Signature: *[Signature]* Date Submitted: **12-09-04**For the Director's Review, submit all documents to: Director of Corrections
P.O. Box 942882
Sacramento, CA 94283-0001
Attn: Chief, Inmate AppealsDIRECTOR'S ACTION: ☐ Granted ☐ P. Granted ☐ Denied ☐ Other☐ See Attached Letter

DOC 601 (12/07)

Date: _____

Beardslee statement for Form 602.

Describe Problem1. The Lethal Injection Procedure As Used in California Violates my Eighth Amendment Rights

I have done a lot of reading on the subject of problems occurring during lethal injection executions in California and around the country. In light of the problems that I have read about, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I have grave concerns that I will not be properly sedated when potassium chloride is administered to stop my heart and kill me. I have been told that potassium chloride will cause me to feel excruciating pain as if my veins were burning. I have also been told that the 2nd drug, pancuronium bromide, will cause me to suffocate if I am not properly sedated by the first drug. Most importantly, I have been informed that other people executed in both California and other states were probably conscious during their executions.

I believe that there is a serious risk that I will be conscious when the 2nd and 3rd drugs are given to me, and that I will feel extreme pain as a result. This violates my rights under the Eighth Amendment to be free from cruel and unusual punishment. If the State is going to kill me, it must do so without the serious risk of unnecessary pain.

STATE OF CALIFORNIA

DEPARTMENT OF CORRECTIONS

**INMATE/PAROLEE
APPEAL FORM**

CDC 602 (12/87)

Location: Institution/Parole Region

Log No.

Category

1. _____

1. _____

2. _____

2. _____

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NAME

Donald Beardsee

NUMBER

C-82702

ASSIGNMENT

North Seg.

UNIT/ROOM NUMBER

WS-18-S

A. Describe Problem:

The Use of Pancuronium Bromide Violates My First Amendment Rights

Please see attached page.

If you need more space, attach one additional sheet.

B. Action Requested:

If I am executed, I request that pancuronium
(or any other paralyzing neurotoxin or substance causing a similar effect) not be
administered.

Inmate/Parolee Signature:

Donald S. Beardsee

Date Submitted:

11-24-04

C. INFORMAL LEVEL (Date Received: _____)

Staff Response: _____

Staff Signature: _____

Date Returned to Inmate: _____

D. FORMAL LEVEL

If you are dissatisfied, explain below, attach supporting documents (Completed CDC 115, Investigator's Report, Classification chrono, CDC 128, etc.) and submit to the Institution/Parole Region Appeals Coordinator for processing within 15 days of receipt of response.

Pursuant to 15 Cal. Code Regs. §3084.7, I am filing this complaint as an
Emergency Appeal and have not sought review at the Informal Level. I am
doing so because I may have an execution date as soon as early January. I do not
have a stay of execution in place.

Signature: _____

Date Submitted: _____

Note: Property/Funds appeals must be accompanied by a completed

CDC Appeal Number:

Board of Control form BC-1E, Inmate Claim

The Use of Pancuronium Bromide Violates My First Amendment Rights. In light of the problems that I have read about occurring in lethal injections in California and around the country, and in light of the fact that I have no information on the qualifications or background of the people who will be performing my execution, I am concerned that I will not be properly anaesthetized when potassium chloride is administered to kill me. If that happens, I will experience horrible burning pain from the potassium chloride. Because the pancuronium bromide will paralyze me, I will be unable to communicate to anyone that I have not been properly anaesthetized and that I am being tortured.

If I am executed, and in the event that I have not been properly anaesthetized, I want to be able to communicate that fact and the fact that I am experiencing excruciating pain. I want to communicate this information so that the Warden, the Director of the Department of Corrections, the Governor, the Legislature, the public and those acting on behalf of other death row inmates can evaluate whether California's execution protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment.

I also want to communicate the information that the execution protocol failed in my case so that 1) the public can be educated about the lethal injection procedure's possibility for torturing the condemned, and 2) the Warden and the Director of the Department of Corrections can be alerted to the failure so that they can identify where the system broke down in order to ensure that the mistake is not repeated in future executions.

I have a First Amendment right to make these communications. The administration of pancuronium bromide is intended to prevent me from doing so.

The use of pancuronium bromide to prevent me from exercising my First Amendment rights is invalid under the standards set in Turner v. Saffley, 482 U.S. 78, 87 (1987). Preventing me from communicating about Eighth Amendment violations or a malfunction in the execution process is not a legitimate penological goal. Additionally, pancuronium bromide will not cause my death; that is the function of the potassium chloride. The restriction on my communication is not content neutral because there would not be any communication if the execution procedure functions properly. If pancuronium bromide is administered, I will not have an alternative means of communicating about problems in my execution because I will be dead. Allowing me to communicate about problems in my execution will have no impact on this institution except to educate other death row inmates for challenging the lethal injection procedure. The question of available alternatives to pancuronium bromide is irrelevant because paralyzing me to prevent me from exercising my First Amendment rights is not a legitimate penological goal.

In California First Amendment Coalition v. Woodford, 2000 U.S. Dist. LEXIS 22189 (N.D. Cal. July 26, 2000) and California First Amendment Coalition v. Woodford, 299 F.3d 868 (9th Cir. 2002), the Northern District of California and the Ninth Circuit recognized that public discussion about execution procedures cannot occur if First Amendment rights are not protected in the process. My First Amendment rights must be protected so that, if necessary, I can contribute to this public debate.

Memorandum

Date: December 2, 2004

To: BEARDSLEE, C-82702
California State Prison, San Quentin

Subject: SECOND LEVEL APPEAL RESPONSE
LOG NO.: SQ 04-2953

ISSUE:

It is the appellant's position that the lethal injection procedure as used in California violates his Eighth Amendment Rights. The appellant states he has grave concerns that he will not be properly sedated when he is administered potassium chloride, the third in a series of three drugs utilized in the lethal injection procedure. The appellant contends he has been told that potassium chloride will cause him excruciating pain as if his veins were burning.

The appellant states he has also been told the second drug administered, pancuronium bromide, will cause him to suffocate if he is not properly sedated by the first drug.

The appellant contends he has been informed that other inmates executed in California and other states were (probably) conscious during their executions. The appellant complains there is a serious risk he will be conscious when the second and third drugs are administered, and as a result, he will feel extreme pain.

In the event the appellant does feel excruciating pain, he wants to communicate the information to the public that the execution protocol has failed so the public can be educated about the procedure's possibility of "torturing" him during the lethal injection procedure.

The appellant alleges the use of pancuronium bromide violates his First Amendment rights under the standard set in *Turner vs. Safley*, 482 U.S. 78, 87 (1987). The appellant complains that preventing him from communicating his Eighth Amendment rights is a malfunction in the process and is not a legitimate penological goal.

The appellant requests on appeal that in the event he is not properly anesthetized, he wants to be able to communicate that fact and that he is experiencing excruciating pain. He wants to communicate this fact to the Warden, to the Director of Corrections, the Governor and to the public and those acting on behalf of all other Death Row inmates.

The appellant additionally is concerned about the qualifications and experience of the people who will be performing the execution.

BEARDSLEE, C-82702
CASE NO. 04-2953
PAGE 2

INTERVIEWED BY: W. Jeppeson, Correctional Counselor II, Appeals Coordinator

REGULATIONS: The rule governing this issue is:

Article 7.5. Execution of Death Penalty

3349. Method of Execution:

- (a) Inmates sentenced to death shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection. Upon being served with the warrant of execution, the inmate shall be served with CDC Form 1801-B (4/98), Service of Execution Warrant, Warden's Initial Interview. The completed CDC Form 1801-B shall be transmitted to the warden.
- (b) The inmate shall be notified of the opportunity for such selection and that, if the inmate does not choose either lethal gas or lethal injection within ten days after being served with the execution warrant, the penalty of death shall be imposed by lethal injection. The inmate's attestation to this service and notification shall be made in writing and witnessed utilizing the CDC Form 1801 (Rev. 4/98), Notification of Execution Date and Choice of Execution Method. The completed CDC Form 1801 shall be transmitted to the warden.
- (c) The inmate's selection shall be made in writing and witnessed utilizing the CDC Form 1801-A (Rev. 4/98), Choice of Execution Method. The completed CDC Form 1801-A shall be transmitted to the warden.
- (d) The inmate's selection shall be irrevocable, with the exception that, if the inmate sentenced to death is not executed on the date set for execution and a new execution date is subsequently set, the person again shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection, according to the procedures set forth in sections (b) and (c).

NOTE: Authority cited: Section 5058, Penal Code. Reference: Section 3604, Penal Code.

In review of the appellants appeal issues and the responses given, it is noted the appellant's issues have been appropriately addressed. On December 6, 2004, the appellant was interviewed by W. Jeppeson, Correctional Counselor II, Appeals Coordinator. At that interview the appellant was advised that any claims as to problems he perceives with California's lethal injection procedure are based solely upon his own information and belief. The appellant provides neither empirical evidence nor any scientific study that would support his claims.

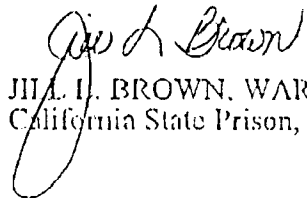
Per Steven S. Lubiner, the appellant's attorney, the appellant will not be selecting a method of execution. Should the appellant not select a method of execution within ten (10) days after service of an execution warrant, California law provides that the penalty of death shall be imposed by lethal injection (see Penal Code Section 3604 (b)).

BEARDSLEE, C-82702
CASE NO. 04-2953
PAGE 3

Based on the submitted documentation from the appellant, as well as the conducted interview, and a thorough review of the appellant's appeal issues by this reviewer, the findings are the appellant's issues have been appropriately addressed and duly responded to. This reviewer finding is the appellant's contentions are without merit.

DECISION: The appeal is denied.

The appellant is advised that this issue may be submitted for a Director's Level of Review if desired.



JILL L. BROWN, WARDEN
California State Prison, San Quentin

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
INMATE APPEALS BRANCH
P.O. BOX 942883
SACRAMENTO, CA 94283-0001

DIRECTOR'S LEVEL APPEAL DECISION

Date: **DEC 14 2004**

EMERGENCY

In re: Boardslce, C-82702
California State Prison, San Quentin
San Quentin, CA 94964

IAB Case No.: 0405819

Local Log No.: SQ 04-2953

This matter was reviewed on behalf of the Director of the California Department of Corrections (CDC) by Appeals Examiner K. Allen, Staff Services Manager I. All submitted documentation and supporting arguments of the parties have been considered.

I APPELLANT'S ARGUMENT: It is the appellant's position that the lethal injection procedure as used in California violates his constitutional rights. The appellant states that the use of the sedative potassium chloride will cause him excruciating pain as if his veins were burning, thus constituting cruel and unusual punishment. The appellant states that he has read a lot of different articles on the subject that support his claim. In the event the appellant does feel excruciating pain, he desires to communicate this information to Departmental staff and the public, so that it can benefit future death row inmates. The appellant also alleges that the use of pancuronium bromide violates his First Amendment rights under the set in Turner vs. Safley, 482 United States 78, 87 (1987). The appellant complains that preventing him from communicating his rights is a malfunction in the process and is not a legitimate penological goal. The appellant requests that if he is executed, that the Department must fix the procedure by which they do lethal injection to make certain he will not suffer unnecessary pain and suffering.

II SECOND LEVEL'S DECISION: The reviewer found that pursuant to the California Code of Regulations, Title 15, Section (CCR) 3349, the appellant has the opportunity to elect to have the punishment imposed by either lethal gas or lethal injection. If the appellant has serious concerns about the "perceived potential" of pain and suffering from lethal injection, he can choose lethal gas. The appellant was also informed that his claims as to the problems he perceives with California's lethal injection procedure are based solely upon his own information and belief. The appellant provided neither empirical evidence nor any scientific study that would support his claims. The appeal was denied at the Second Level of Review (SLR).

III DIRECTOR'S LEVEL DECISION: Appeal is denied.

A. FINDINGS: The SLR has properly reviewed and considered the appellant's appeal issues. The appellant has failed to provide any substantive evidence that would lend credibility to his claim that he will feel excruciating pain by the method of execution utilized by the State of California. The appellant's sentence and penalty were established by court in California; therefore, relief at the Director's Level of Review cannot be afforded the appellant.

B. BASIS FOR THE DECISION:
California Penal Code Section: 3604, 5058
CCR: 3004, 3349

C. ORDER: No changes or modifications are required by the institution.

This decision exhausts the administrative remedy available to the appellant within CDC.



N. GRANNIS, Chief
Inmate Appeals Branch

cc: Warden, SQ
Appeals Coordinator, SQ